83-959

No.

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SUPREME COURT OF THE UNITED STATES

_____ Term

FRANCES M. HOUGLAND,
ALLAN B. KLEET,
FRED H. GRIMES, and
LARRY BARNETT and CARNEY ALLEN,
as partners of the Certified Public Accounting Firm of Allen and Barnett - - Petitioners

versus

KEVIN GROSS, as receiver for Hougland Barge Line, Inc., a dissolved Delaware Corporation - - - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is there collusive jurisdiction if Kentucky shareholders use a Delaware citizen to sue Kentucky defendants when the shareholders could have brought the suit in their own name?

INTRODUCTION

The petitioners, Frances M. Hougland, et al., hereby petition this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the action of that Court in a proceeding entitled, "No. 81-5818, Kevin Gross, etc. v. Frances M. Hougland, et al.," in which said Court rendered an opinion and Judgment on July 11, 1983, both of which are reproduced in the Appendix hereto. Said opinion is reported at 712 F. 2d 1034.

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SUPREME COURT OF THE UNITED STATES

_____ Term

No.

FRANCES M. HOUGLAND,
ALLAN B. KLEET,
FRED H. GRIMES, and
LARRY BARNETT and CARNEY ALLEN, as partners of the Certified Public Accounting Firm of Allen and Barnett - *Petitioners*

v.

KEVIN GROSS, as receiver for Hougland Barge Line, Inc., a dissolved Delaware Corporation - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS, ORDERS AND JUDGMENTS IN COURTS BELOW

The following are the opinions and orders in the courts below, all of which are reproduced in the Appendix hereto, at the page numbers indicated. Only the Opinion of the United States Court of Appeals for the Sixth Circuit (March 28, 1980) has been officially reported (712 F. 2d 1034).

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GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that the opinion and judgment of the United States Court of Appeals for the Sixth Circuit contravened 28 U.S.C. §1652 and *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), by

failing to follow Kentucky law in a diversity of citizenship case, or 28 U.S.C. §1359 by allowing collusive jurisdiction.

THE JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed and the opinion on which it was based were filed in the United States Court of Appeals for the Sixth Circuit on July 11, 1983. Both are printed together in the Appendix hereto at pages 5a-19a. The Sixth Circuit opinion has been published, styled Kevin Gross, etc. v. Frances M. Hougland, et al., at 712 F. 2d 1034. Petitioners Petition for Rehearing was denied September 12, 1983, and a Mandate issued November 10, 1983.

STATUTORY PROVISION CONFERRING ON THIS COURT JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED HEREIN

28 U.S.C. §1652: A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

28 U.S.C. §1652: The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

§202 Constitution of Commonwealth of Kentucky: No corporation organized outside the limits of this State shall be allowed to transact business within the State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this Commonwealth.

Kentucky Revised Statutes, 271A.525: A foreign corporation which shall have received a certificate of authority under this chapter shall, until a certificate of revocation or of withdrawal shall have been issued as provided in this chapter, enjoy the same, but no greater, rights and privileges as a domestic corporation organized for the purposes set forth in the application pursuant to which such certificate of authority is issued; and, except as in this chapter otherwise provided, shall be subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character.

Kentucky Revised Statutes, 271A.515: The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this chapter, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two (2) years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two (2) years so as to extend its period of duration.

Delaware Corporation Code §279: When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any one, who, in the Court's discretion, shows good cause therefor, at any time, may either appoint one or more of the directors of the corporation to be trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

STATEMENT OF THE CASE
An Overview

Petitioners include majority shareholder, director, accountant, and attorney of a dissolved Delaware Cor-

poration, whose only office was in Kentucky. After dissolution of the corporation, certain persons who had been minority shareholders of the corporation caused Respondent, Kevin Gross, who was plaintiff in the U. S. District Court action, to file a lawsuit averring that breaches of duties by Petitioners caused the corporation to have to pay taxes that could have been avoided in the dissolution process. This action was filed in the United States District Court for the Western District of Kentucky.

Following motions for summary judgments filed by Petitioners (defendants in the U. S. District Court action), the U. S. District Court Judge was convinced that such an action could not have been filed by a dissolved Kentucky corporation; that Kentucky law would not allow a foreign corporation to do what a Kentucky corporation could not do, and dismissed the action.

Respondent appealed. On appeal the United States Court of Appeals for the Sixth Circuit considered at length whether there had been collusive jurisdiction, as prohibited by 28 U.S.C. §1359, before addressing the issue of Kentucky's substantive corporate law. The inquiry into jurisdiction was appropriate because several of the minority shareholders, on whose behalf the plaintiff-respondent had asserted the claim, were citizens of Kentucky, as was the dissolved corporation, and all defendant-petitioners. The Court of Appeals decided that jurisdiction could not be collusive because only a receiver, appointed pursuant to Delaware law,

could assert the claim, and that said receiver had to be a resident of Delaware.

Examining the issue of Kentucky law, the Court of Appeals held that the claim could be asserted because it was not forbidden by Kentucky law. Respondents urge that this decision is inconsistent with the premise of the first decision. If only a receiver, like respondent, can assert the claim, then the claim is that of a corporation that had been dissolved more than two years. Kentucky law does not allow a corporation so dissolved to assert such a claim.

DATES

Dates are as follows:

March 1, 1977: Corporation filed a Certificate of Dissolution with the Secretary of State of Delaware, and documents to that effect with the Secretary of State of Kentucky.

Thereafter, the corporation sold its assets, paid taxes, and distributed assets. Taxing authorities then assessed additional taxes against the corporation.

March 14, 1980, the dissolved corporation paid an additional $150,240.06 in taxes, interest and penalties to the Internal Revenue Service and an additional $23,378.11 in taxes and penalties assessed to the Commonwealth of Kentucky.

March, 1981, A minority shareholder of the dissolved corporation, Robert W. Hougland, Jr., petitioned the Delaware Court of Chancery to appoint a receiver, and Kevin Gross was so appointed.

March 11, 1981: Gross filed this action in U. S. District Court claiming the additional amounts paid the taxing authorities.

THE PARTIES

Petitioners are a majority shareholder, who also was an officer and director of the dissolved corporation; an accountant, who also was a director of the dissolved corporation; and an attorney for the dissolved corporation, and will be referred to as "Petitioners."

Minority shareholders, who would benefit from any recovery herein, include a Citizen of Texas, as well as Citizens of Kentucky. Kevin Gross, the receiver appointed by the Chancery Court of Delaware, is a citizen of Delaware and will be referred to as "Respondent."

REASON FOR GRANTING THE WRIT

I. State Law Cannot be Ignored When Deciding Collusion Under 28 U.S.C. 1359

A. The Modern Solution to Diversity Issues Rests on State Law

For many years, United States Courts struggled with determining the citizenship of nominal parties in diversity of citizenship cases. The decision of *Kramer* v. *Carribean,* 394 U. S. 823, 23 L. Ed. 2d 9, 89 S. Ct. 1487 (1969) provided a new and effective test to solve this problem. *Kramer* held that "collusion," as used in 28 U.S.C. §1359, need not be fraudulent or criminal. Rather, collusion exists under this statute if diversity of citizenship is created where otherwise there would be none. Thereafter, the U. S. Circuit Court of Appeals

have interpreted at face value the citizenship of a nominal party such as respondent, but have used the *Kramer* rule to prevent abuse of jurisdiction based on diversity of citizenship. The opinion of the Court of Appeals for the Sixth Circuit, in this case, contains an excellent analysis of how the different circuits have used *Kramer* to make 28 U.S.C. 1359 a workable rule.

However, the use of 28 U.S.C. 1359 requires detailed analysis of applicable state law to determine choices available to the claimant. Necessary to a decision is determination of whose claim is asserted and how else could it have been asserted. Inevitably, these are matters of state substantive law, which must be applied. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

In this case, the U. S. Court of Appeals for the Sixth Circuit applied the *Kramer* doctrine without proper consideration of Kentucky's substantive law. Should such practice develop extensively, it would undermine *Erie* v. *Tompkins, supra,* and this Court should declare that the two doctrines, *Kramer* and *Erie,* are not and need not be incompatible.

B. The Circuit Court of Appeals Found That the Claim Belonged to the Dissolved Corporation

In this case, the minority shareholders of a dissolved Delaware corporation had appointed a receiver to file suit against Petitioners. The dissolved corporation had its only principal office in Kentucky; the minority shareholders were citizens of Kentucky and at least one other state, and the Petitioners, who were

defendants in the U. S. District Court, were citizens of Kentucky. Therefore, the basis of diversity of citizenship jurisdiction had to be examined.

The opinion of the Court of Appeals analyzed the Respondent's citizenship in light of 28 U.S.C. §1359. The Court found many factors that indicated collusive jurisdiction, such as the receiver's having no other duties, the receiver's having no substantive interest in the outcome, and the controversies being local in character. However, the Court found that there could be no collusive jurisdiction because the receiver had to be a resident of Delaware. Del. Cl. R. 150.

By making this finding, the Court implicitly held that Respondent's only claim was pursuant to Delaware Corporate Code §279, which Kentucky law does not allow.

C. The Court's Opinion Offends the Law of Kentucky and Erie v. Tompkins

This is a suit by a receiver of a Delaware corporation that was filed more than two years after the corporation was dissolved. Kentucky law does not allow a corporation dissolved more than two years to make a claim. Kentucky law does not allow a foreign corporation to do what a Kentucky corporation cannot do. The claim asserted by the receiver is the claim of the dissolved corporation. Therefore, the court's opinion allows a Delaware corporation to do what a Kentucky corporation cannot do.

1. KENTUCKY DOES NOT ALLOW A CORPORATION DISSOLVED MORE THAN TWO YEARS TO FILE SUIT

The opinion of the U. S. Court of Appeals for the Sixth Circuit completely missed the effect of the corporation's being dissolved. The Court ruled that if a statute does *not* forbid a dissolved corporation's suing, it can sue. The rule is the opposite. Unless a statute so *allows,* a dissolved corporation is not permitted to make a claim. *Bank of Galliopolis* v. *Trimble,* 45 Ky. 599, VI B. Mon 599 (1846), which in no respect has been overruled and is commended for its general applicability to this case, states:

> "The charter of the Bank according to its terms expired on the 1st January, 1843; after that period we are aware of no rule of practice or statutory provision in Kentucky, or of any common law principle, which authorized the farther prosecution of the suit, in the name of the expired corporation." 45 Ky. at page 602.

After that case was decided, Kentucky enacted statutes authorizing a dissolved corporation to bring claims up to two years after its dissolution, the present version of which is KRS 271A.515. The Court of Appeals was correct in holding that KRS 271A.515 does not apply. The Court of Appeals erred by holding that its nonapplicability gave a dissolved corporation the right to sue. If Hougland Barge Line, Inc., had been a Kentucky corporation it could not have brought this suit.

Kentucky does not allow a foreign corporation to do what a Kentucky corporation cannot do. Section

202 of the Constitution of the Commonwealth of Kentucky, and KRS 271A.525 specifically state this.

Bank of Galliopolis v. *Trimble, supra,* states:

> "There certainly can be no justice or propriety in authorizing a foreigner to prosecute a suit in the name of a dead plaintiff, a dissolved, extinct corporation, in virtue of the laws of Ohio, when the same privileges are denied by the laws of Kentucky to its own citizens. The rule laid down by that eminent jurist, Justice Story, in his conflict of laws, page 469, upon this subject, is undoubtedly the correct one.
>
> He says: 'All, that any nation can be justly required to do is to open its own tribunals to foreigners, in the same manner and to the same extent as they are open to its own subjects, and to give them the same redress, as to rights and wrongs, which it seems fit to acknowledge in its own municipal code for natives and residents.' " at pages 603, 604.

Therefore, Hougland Barge Line, Inc. cannot assert this claim because it had been dissolved more than two years.

2. THE FINDING OF NO COLLUSION IMPLIES THAT THE CLAIM BELONGS TO THE DISSOLVED CORPORATION

The Court of Appeals held that the Delaware citizenship of the Respondent, the receiver Mr. Gross, could not have been collusive because only a Delaware citizen can be a receiver pursuant to Delaware Statute §279. This holding establishes that the claim asserted is that of the dissolved corporation.

Delaware §279 allows a receiver:

> ". . . of and for the corporation, to take charge of the corporation's property, and to collect debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper . . . and to do all other acts which might be done by the corporation,. . . ."

Therefore, Respondent has come into possession of the corporation's claim. The corporation could not have asserted that claim because it had been dissolved more than two years. The receiver had no more than the corporation had; therefore, the receiver could not have asserted that claim.

Petitioners recognize the validity of the Receiver's appointment under the Full-Faith and Credit clause. Mr. Gross is appointed. He simply has a claim that cannot be asserted in Kentucky.

Petitioners seek no discrimination against a foreign corporation or a foreign receiver. It is respondent who seeks to have a Delaware corporation accorded more rights in Kentucky than a Kentucky corporation has.

II. Either Kentucky Law or 28 U.S.C. 1359 Was Ignored

If the claim belonged to the corporation, Kentucky law was ignored because the Court allowed a Delaware corporation, in Kentucky, to do what a Kentucky corporation cannot do. If it is considered that the claim belonged to the shareholders, then they individually could have brought the claim. However, because some

of the minority shareholders are Kentucky citizens, they would not have had diversity of citizenship. Therefore, their election to use the receiver was collusive and prohibited by 28 U.S.C. §1359.

In applying *Erie* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), United States Courts must accept "the laws of the several states." 28 U.S.C. 1652. The law of Kentucky is that a corporation that has been dissolved more than two years cannot assert a claim, and that a foreign corporation cannot do what a Kentucky corporation did. Therefore, the U. S. Court of Appeals for the Sixth Circuit either ignored this law or implicitly held that the claim asserted by the receiver was not the corporation's claim, but the shareholder's claim.

Under Kentucky law, upon dissolution of the corporation, the claim, being in the nature of a property right, would pass to the shareholders. *Shadoin* v. *Sellars,* 223 Ky. 751, 4 S. W. 2d 717 (1928). Though by virtue of KRS 271A.515, the corporation cannot now bring suit on the claim, such statutory bar would not preclude the shareholders from bringing same. *Levy* v. *Liebling,* 7th Cir. 238 F. 2d 505 (1956). Since the claim should be considered to belong to the shareholders, they clearly had a choice to prosecute it in their names or in the name of the receiver, and hence, there was collusion.

CONCLUSION

The prohibition of "collusive jurisdiction" by 28 U.S.C. §1359 is a useful tool in deciding the citizenship of nominal parties in diversity of citizenship cases. However, *Erie* v. *Tompkins* requires that state law determine matters of substance. In this case, Kentucky law applies. If Respondent's claim is interpreted to belong to the corporation, the claim cannot be asserted. If Respondent's claim is interpreted to belong to the minority shareholders, they had a choice that established jurisdiction as to how to file this suit. The statute that prohibits collusive jurisdiction must be applied to relations determined by the substantive law of the forum state.

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Attorneys for Petitioner

CERTIFICATION

I hereby certify that three copies of this Petition have been served upon all parties required to be served by Rule 33 of this Court by mailing the same, first class postage prepaid, addressed to Stites, McElwain & Fowler, 3400 First National Tower, Louisville, Kentucky 40201, Attorneys for Kevin Gross, as Receiver for Hougland Barge Line, Inc.

This the 8th day of December, 1983.

By R. C. Roberts

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APPENDIX

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 81-0058-P

KEVIN GROSS, Etc., - - - - - - - - *Plaintiff,*

v.

FRANCES M. HOUGLAND, et al., - - - - *Defendants.*

MEMORANDUM OPINION—Entered September 28, 1981

This action is before the Court on defendants' motions to dismiss. Plaintiff brought this action on behalf of a Delaware corporation (which has been dissolved since 1977) under the diversity statute 28 U.S.C. §1332. The corporation had its principal place of business in Kentucky and at least three of the four shareholders were Kentucky citizens (the residence of the fourth is unknown). The underlying controversy is a disagreement between the minority shareholders and the majority shareholder, Frances M. Hougland (who owned 70% of the stock). It is alleged that Defendant Hougland and the other defendants (the attorney and accountants for the corporation) neglected to adopt the most advantageous method in dissolving the corporation and, as a result, the corporation was assessed excessive tax liability. Defendants claim, among other things, that the underlying dispute is one between citizens of the same state and therefore there is no diversity of citizenship.

Plaintiff Kevin Gross is the receiver appointed by the Delaware Court of Chancery to prosecute this action "in the name of the corporation." Del. Code §279. Plaintiff contends that since the receiver is a citizen of Delaware there

is complete diversity, although he sues in the name of a corporation which had its principal place of business in Kentucky and which was owned by Kentucky shareholders. Plaintiff further asserts that his capacity to sue is determined by Kentucky law under F.R.C.P. 17(b). Defendants agree that capacity to sue is controlled by Kentucky law. But defendants argue that Kentucky does not recognize plaintiff's cause of action.

Plaintiff maintains that Kentucky courts must recognize and entertain a lawsuit brought in the name of a Delaware corporation that has been dissolved for over four years. Plaintiff makes this assertion even though Kentucky law requires such actions to be brought within two years of dissolution (Ky. Rev. Stat. 271A.515) and provides that foreign corporations doing business in Kentucky are subject to the same restrictions as Kentucky corporations (Ky. Rev. Stat. 271A.525). *See also* Kentucky Constitution §202.

Plaintiff says these provisions of Kentucky law are inapplicable since this action is brought by a receiver in the name of the corporation, not by the corporation itself. The Court does not agree. Whatever the label applied to plaintiff, it is clear plaintiff is asserting a cause of action not recognized in Kentucky. *Bank of Galliopolis* v. *Trimble*, 45 Ky. (6B. Mon.) 599 (1846).

It is true that Kentucky courts are obliged to recognize the status of the receiver appointed by a Delaware court under the full faith and credit clause of Article IV, §1 of the U. S. Constitution. But recognition of the receiver's official status has nothing to do with whether Kentucky courts are required to serve as a forum for this cause of action.

The Delaware legislature cannot create a cause of action expanding the jurisdiction of foreign courts. Kentucky courts must recognize plaintiff's status and treat him like anyone else bringing a lawsuit in the name of a dissolved

corporation. Since this corporation has been dissolved over two years, Kentucky does not allow prosecution of such a suit.

As the Kentucky Court of Appeals noted in *Leiserson & Adler, Inc.* v. *Keam*, 266 S. W. 2d 352 (1954), the statute "requires a defunct corporation to commence all suits within two years after its dissolution." *Id.* at 356. The fact that the receiver is also a named plaintiff does not alter that fact that this action is brought "in the name of the corporation."

Defendants have made a persuasive argument that there is no diversity of citizenship since the receiver is merely a nominal party and the underlying dispute is between citizens of the same state. *Messer* v. *American Gems, Inc.*, 612 F. 2d 1367 (4th Cir. 1980); *Lester* v. *McFadden*, 415 F. 2d 1101 (4th Cir. 1969). However, in view of the Court's ruling that this kind of suit must be brought within two years of dissolution in Kentucky, it is unnecessary to decide whether diversity jurisdiction is proper. An order dismissing the complaint will be entered.

DATED: September 25, 1981.

(s) Edward H. Johnstone
Judge, United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 81-0058-P

KEVIN GROSS, Etc., - - - - - - - - *Plaintiff,*

v.

FRANCES M. HOUGLAND, et al., - - - *Defendants.*

ORDER--Entered September 28, 1981

For the reasons stated in the memorandum opinion entered this day,

IT IS ORDERED AND ADJUDGED:

1. The motions to dismiss made by defendants are GRANTED.

2. This action is DISMISSED and this order is final and appealable, there being no just cause for delay.

DATED: September 25, 1981.

(s) Edward H. Johnstone
Judge, United States District Court

No. 81-5818

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN GROSS, as receiver for Hougland Barge Line, Inc., a dissolved Delaware corporation, - - - - - *Plaintiff-Appellant,*

v.

FRANCES M. HOUGLAND, et al., - *Defendants-Appellees.*

ON APPEAL from the United States District Court
Western District of Kentucky
Paducah Division

OPINION—Decided and Filed July 11, 1983

Before: KENNEDY & WELLFORD, Circuit Judges, CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge. The plaintiff-appellant, Kevin Gross, appeals from an order dismissing his diversity action for failure to state a claim upon which relief can be granted. Gross, a resident of Delaware, was appointed receiver for Hougland Barge Line, Inc., a dissolved Delaware corporation and was authorized to prosecute this lawsuit pursuant to Sec. 279 of the Delaware Corporation Code. The complaint alleges that diversity of citizenship exists and, thus, that the district court has jurisdiction based upon 28 U.S.C. Sec. 1332. The district court assumed that it had subject matter jurisdiction, but dismissed the action for failure to state a claim upon which relief could be granted. We reverse.

Hougland Barge Line was a closely held corporation doing business in Kentucky. On March 1, 1977, the corporation filed a certificate of dissolution with the Secretary of State of Delaware and filed documents with the Secretary of State of Kentucky which indicated that it was no longer transacting business in Kentucky. The corporation sold its assets and paid the applicable state and federal taxes. On March 14, 1980, the dissolved corporation paid an additional $150,240.06 in taxes, interest and penalties assessed by the United States and an additional $23,378.11 in taxes and penalties assessed by the Commonwealth of Kentucky.

Robert W. Hougland, Jr., a shareholder[1] of the dissolved corporation, petitioned the Delaware Court of Chancery for appointment of a receiver to bring an action on behalf of the dissolved corporation. In early March, 1981, the Court of Chancery appointed the plaintiff as receiver and authorized him to bring this action.[2] On March 11, 1981, the plaintiff filed an action naming four Kentucky citizens as defendants. The complaint alleges that the corporation's majority shareholder, its accountants, and its attorney were negligent in liquidating the corporation's assets and, consequently, that the corporation was required to pay additional taxes, penalties, lawyer's fees, and accountant's fees. The complaint also alleged that complete diversity of citizenship existed between the plaintiff, a Delaware citizen, and the defendants, all of whom are citizens of Kentucky.

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[1]Robert W. Hougland, Jr., is a resident of Houston, Texas. He owns 335 shares of stock in the dissolved corporation which he inherited from the estate of his father Robert W. Hougland, Sr., on July 11, 1977. Hougland, Jr., was not a shareholder at the time the certificate of dissolution was filed on March 1, 1977.

[2]Plaintiff was appointed pursuant to Del. Ch. R. 150, which requires that receivers appointed to represent dissolved corporations must be residents of the State of Delaware.

Several defendants jointly moved to dismiss, asserting alternate grounds for dismissal. First, the defendants argued that the district court lacked subject-matter jurisdiction because diversity of citizenship was manufactured by the appointment of the plaintiff as receiver. *See* 28 U.S.C. Sec. 1359. Second, the defendants asserted that the complaint failed to state a claim upon which relief could be granted because Kentucky law did not allow a dissolved corporation to bring suit in Kentucky beyond two years after its dissolution. KRS 271A.515; *See* KRS 271A.525. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6), concluding that the plaintiff was "asserting a cause of action not recognized in Kentucky." The district court did not decide whether is had subject-matter jurisdiction.

On appeal, the plaintiff addresses both branches of the motion to dismiss. He asserts that Kentucky is bound to give full faith and credit to the judgment of the Delaware courts which specifically appoints him as receiver and authorizes him to bring the suit under Sec. 279 of the Delaware Corp. Code; in the alternative, he argues that Kentucky law permits the suit to be maintained. Finally, the plaintiff asserts that as the statutory receiver for the dissolved corporation, his citizenship is controlling for purposes of determining whether diversity of citizenship exists. The plaintiff asserts that he is a citizen of Delaware and that the defendants are all citizens of Kentucky; thus, the plaintiff concludes that the district court had subject-matter jurisdiction based upon the parties' diverse citizenship.[3]

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[3]If the plaintiff's citizenship is not considered for purposes of diversity jurisdiction, then the citizenship of the beneficiaries of the lawsuit must be considered, *e.g.*, *McSparran* v. *Weist*, 402 F. 2d

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Initially, we state our disapproval of the district court's decision to dispose of this action on the merits without first resolving the question of subject-matter jurisdiction. The federal courts are courts of limited jurisdiction; they have only such jurisdiction as is defined by Article III of the Constitution and granted by Congress. *See Owen Equipment and Erection Co.* v. *Kroger*, 437 U. S. 365, 372 (1978); *Graves* v. *Sneed*, 541 F. 2d 159, 151 (6th Cir. 1976); *In re Carter*, 618 F. 2d 1093, 1098 (5th Cir. 1980) ("[D]ue regard for the constitutional allocation of powers between the state and federal systems requires a federal court scrupulously to confine itself to the jurisdiction conferred on it by Congress and permitted by the Constitution"). A federal court is not a general respository of judicial power; thus, it must satisfy itself that it has subject-matter jurisdiction over the dispute before it addresses the merits of the claims. *Memphis American Fed. of Teachers Local 2032* v. *Board of Education*, 534 F. 2d 699, 701 (6th Cir. 1976) ("Without a *finding* that there is federal jurisdiction over a particular claim for relief, the federal courts are without power to proceed" (emphasis added). We believe that the proper practice is to resolve all questions regarding subject matter jurisdiction prior to ruling upon the merits of the claim. Consistent with these principles, we first consider whether the district court, and thus this court, has subject-matter jurisdiction.

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867, 870 (3rd Cir. 1968) (must either look to the citizenship of representative or to citizenship of the party represented); the beneficiaries of this lawsuit are the shareholders, not the dissolved corporation. Three of the four shareholders of the dissolved corporation are Kentucky citizens, and all of the defendants are Kentucky citizens. Thus, this action must be dismissed for lack of subject-matter jurisdiction if the plaintiff was improperly appointed, because complete diversity of citizenship will not exist.

Normally, a representative may rely upon his citizenship, rather than the citizenship of the party he represents, when he asserts federal jurisdiction based upon diversity of citizenship. *See Mecom* v. *Fitzsimmons Drilling Co., Inc.*, 284 U. S. 183 (1931). *Deposit Guaranty Bank and Trust* v. *Burton*, 380 F. 2d 345, 348 (6th Cir. 1967). When a fiduciary asserts federal jurisdiction under 28 U.S.C. Sec. 1332(a)(1), he may rely upon his citizenship if he can establish that he is the real party in interest by demonstrating that the law of the appointing authority permits him to sue in his own name, without joining any of the persons that he represents. *Burton*, 380 F. 2d at 347-48. *See also C. Wright & A. Miller*, Federal Practice and Procedure, Sec. 3606 at 628-29.

This principle is limited, however, by 28 U.S.C. Sec. 1359.[4] By enacting Sec. 1359, Congress sought to assure that ordinary contract and tort litigation is not diverted to the federal courts by litigants using devices to create the appearance, but not the substance, of federal diversity jurisdiction. *Kramer Caribbean Mills*, 394 U. S. 823, 838-39 (1969) (assignment of a claim). The courts of appeal have interpreted Sec. 1359 to limit the scope of Sec. 1332 in cases involving administrators and guardians appointed for the apparent purpose of creating diversity of citizenship. *See e.g. O'Brien* v. *Avco Corp.*, 425 F. 2d 1030 (2nd Cir. 1969); *McSparran* v. *Weist*, 402 F. 2d 867 (3rd Cir. 1968)*cert. denied*, 395 U. S. 903 (1969) (guardain); *Messer* v. *American Gems*, 612 F. 2d 1367, 1373-74 (5th Cir. 1980) *cert. denied*, 446 U. S. 956 (1980); *Bass* v. *Texas Power & Light*

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[4]28 U.S.C. Sec. 1359 provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or conclusively made or joined to invoke the jurisdiction of such court.

Co., 432 F. 2d 763, 766 (5th Cir. 1970) *cert. denied*, 401 U. S. 975 (1971); *Betar* v. *DeHaviland Aircraft of Canada, Ltd.*, 603 F. 2d 30 (7th Cir. 1979) *cert. denied*, 444 U. S. 1098 (1980); *Rogers* v. *Bates*, 431 F. 2d 16 (8th Cir. 1970) (conservator); *Hackney* v. *Newman Memorial Hospital*, 621 F. 2d 1069, 1070-71 (10th Cir.) *cert. denied*, 449 U. S. 982 (1980). These courts have concluded that the appointment of an administrator with diverse citizenship is not dispositive of the jurisdictional question, even if the representative has the power to sue in his own name. *See e.g.*, *Betar* v. *DeHavilland Aircraft of Canada, Ltd.*, 603 F. 2d at 35; *Messer* v. *American Gems*, 612 F. 2d at 1374-75. These decisions are premised upon the need to assure that the federal courts consider only those "cases that 'really and substantially' involve a dispute within the jurisdiction of the federal courts" by assuring that the federal courts do not assume jurisdiction when the dispute is local, rather than interstate, in character. *Betar*, 603 F. 2d at 351; *Bishop* v. *Kendricks*, 495 F. 2d 289, 294 (4th Cir.) *cert. denied*, 419 U. S. 1056 (1974); *O'Brien* v. *AVCO Corp.*, 425 F. 2d at 1032. Finally, several courts have noted that no meaningful distinction exists between an assignment of a claim to a disinterested party for the purpose of creating diversity of citizenship and the appointment of a disinterested fiduciary to create diversity of citizenship; in either event, the party has attempted to create diversity of citizenship merely by complying wih the formalities of state law. *E.g. McSparran* v. *Weist*, 402 F. 2d at 874; *O'Brien* v. *AVCO Corp.*, 425 F. 2d at 1036. *Cf. Kramer* v. *Caribbean Mills*, 394 U. S. at 828-29 (creation of diversity of citizenship by assignment is a "manufacture of jurisdiction" and thus, "improperly or collusively made"). Thus, these courts have concluded that a "party . . . has been improperly or collusively made or joined . . ." 28 U.S.C. Sec. 1359,

when the primary aim of the transaction or appointment is to manufacture federal jurisdiction.[5]

We believe that these principles, which limit the ability of a guardian or administrator to rely upon his citizenship for purposes of diversity jurisdiction, apply with equal force in this instance.[6] The plaintiff is the corporate counterpart of an administrator; he has been appointed to represent a defunct corporation and he is responsible for liquidating the remaining assets of the dissolved corporation.[7] Moreover, the appointment of a receiver, like the

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[5]*See* text accompanying note 8, *infra*.

[6]Although we conclude that a representative appointed to create diversity may not rely upon his citizenship to create diversity, this conclusion in no way affects the vitality of this court's holding in *Deposit Guaranty Bank & Trust* v. *Burton, supra*. In *Burton*, this court concluded that 28 U.S.C. 1332 permits an administrator who is the real party in interest to rely upon his own citizenship to establish diversity of citizenship. We continue to adhere to that view. We believe that this principle is limited, however, in those situations where the purpose of the appointment is challenged under Sec. 1359, a question which was not addressed by the panel in *Burton*.

[7]Section 279 of the Delaware Corporation Code provides:

> When any corporation organized under this chapter shall be dissolved in any manner whatever, the Court of Chancery, on application of any creditor or stockholder of the corporation, or on application of any one, who, in the Court's discretion, shows good cause therefor, at any time, may either appoint one or more of the directors of the corporation to be trustees, or appoint one or more persons to be receivers, of and for the corporation, to take charge of the corporation's property, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which

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appointment of an administrator, often results from the unilateral acts of the party contemplating litigation; the appointment proceeding is rarely adversary in nature and, in most circumstances, the choice put forward by the party contemplating litigation is likely to be accepted by the appointing authority. Thus, in either instance, the potential for abuse of the federal forum is substantial. In short, we believe that the principles developed by the Courts of Appeal under Sec. 1359 for determining whether an administrator has been appointed for the purpose of manufacturing diversity jurisdiction are equally important in the present context: a person may not obtain the appointment of a receiver for the purpose of creating diversity of citizenship anymore than he may obtain the appointment of an administrator to create diversity of citizenship. In either event, the manufacture of jurisdiction is collusive and improper within the meaning of Sec. 1359, and, thus, the citizenship of the representative may not be relied upon to establish diversity of citizenship.

In the context of Sec. 1359, the plaintiff must show that the primary purpose for the appointment of the fiduciary is not to manufacture diversity of citizenship. *E.g. McSparran* v. *Weist*, 402 F. 2d at 875-76 (purpose conceded); *Bass* v. *Texas Power & Light Co.*, 432 F. 2d at 766. We emphasize, however, that the subjective purpose of the party procuring the appointment is not the sole factor in this

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might be done by the corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

inquiry.[8] *E.g. Betar* v. *DeHavilland Aircraft of Canada, Ltd.*, 603 F. 2d at 35; *Lester* v. *McFaddon*, 415 F. 2d 1101, 1106 n.11 (3rd Cir. 1969). In the course of such an inquiry, several factors may be material: the court should consider, among other things, whether the fiduciary has duties other than prosecuting the lawsuit, *Messer* v. *American Gems*, 612 F. 2d at 137; whether the fiduciary is the "natural" representative, *Groh* v. *Brooks*, 421 F. 2d at 589, 595 (3rd Cir. 1970); whether the appointment was in fact motivated by a desire to create diversity jurisdiction, *Bass* v. *Texas Power & Light*, 432 F. 2d 763, 766 (5th Cir. 1970); and whether the suit is local in character,[9] *Groh* v. *Brooks*, 421 F. 2d at 595; *Trager* v. *New Rochelle Hospital Medical Center*, 453 F. Supp. 516, 520 (S.D. N.Y. 1978).

We believe that the plaintiff was not improperly appointed and, consequently, that he may rely upon his citizenship to establish diversity. Unlike most cases, the purpose for the plaintiff's appointment is clear: if the

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[8]The subjective intent of the party seeking the appointment, when it is the sole justification for the appointment, may be dispositive. *E.g. McSparran* v. *Weist*, 402 F. 2d at 876; *Bass* v. *Texas Power & Light Co.*, 432 F. 2d at 766. If, however, the appointment is the result of the confluence of several factors, including a subjective purpose to create diversity of citizenship, then the factfinder must weigh all of the factors to determine whether the *primary* purpose for the appointment was to create diversity of citizenship. *See Hackney* v. *Newman Memorial Hospital*, 621 F. 2d at 1071 (subjective purpose not dispositive when independent valid reason exists for appointment).

[9]This factor is directly related to the policies underpinning jurisdiction based on diversity of citizenship. *Betar* v. *DeHavilland Aircraft of Canada*, 603 F. 2d at 35 ("The purpose of diversity jurisdiction is to prevent local prejudice. . . ."). Thus, courts should ascertain whether a party has attempted to transform a "local" dispute into an interstate dispute by obtaining the appointment of a representative with diverse citizenship.

plaintiff, or another resident of Delaware, had not been appointed as receiver, this cause of action could not have been brought in any federal or state court. Under Delaware law, a corporation which has been dissolved for more than three years may sue only if a receiver is appointed to act on behalf of the corporation. *See* Delaware Code, tit. 8, Sec. 279. A receiver appointed pursuant to Sec. 279 must be a resident of Delaware, Del. Ch. R. 150. Thus, if a suit is to be brought at all, it must be prosecuted by a resident of Delaware. Because of these considerations, we are convinced that the primary purpose for the plaintiff's appointment was not the desire to manufacture diversity jurisdiction.[10] Therefore, we conclude that diversity of citizenship exists between the Delaware plaintiff and the Kentucky defendants and that the district court had subject matter jurisdiction.

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[10]The Fourth Circuit has concluded that an administrator may not rely upon his citizenship to establish diversity jurisdiction when his appointment is required by the law of the forum state as a prerequisite to bringing an action in the forum. *E.g., Vaughn* v. *Southern Rwy. Co.*, 542 F. 2d 641, 645-46 (4th Cir. 1972).

The Fourth Circuit approach effectively abandons any notion that the purpose for the appointment is an important factor under Sec. 1359. *Vaughn* v. *Southern Rwy. Co.*, 542 F. 2d at 644. We are unwilling to extend Sec. 1359 so far. The unmistakable language of Sec. 1359 indicates that a district court shall not have jurisdiction when a party "has been improperly or collusively made or joined *to invoke the jurisdiction of such court.*" (emphasis added). The last seven words indicate the type of manufacture or joinder that the statute governs; joinder or manufacture for the purpose of invoking the court's jurisdiction. We are unwilling to depart from the plain language of the statute and we cannot conclude that an appointment of a receiver made for the purpose of satisfying a condition precedent to the maintenance of this action in any forum is within the scope of Sec. 1359, and, therefore, we agree with Judge's Butzner's dissent in that case.

The district court dismissed the complaint for failure to state a claim because the action was not commenced within two years of the date of dissolution. *See Ky. Rev. Stat.*, 217A.515.[11] Essentially, the district court treated Sec. 271A.515 as a statute of limitation[12] and concluded that,

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[11]Ky. Rev. Stat. Sec. 271A.515 provides:

> The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the secretary of state, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this chapter, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

[12]Section 271A.515 is modeled after Sec. 105 of the Model Business Corporation Act. Although Sec. 105 has been treated as providing for the survival of a corporation's remedies for two years after dissolution, *see* Fletcher, Cyclopedia of Corporations, Sec. 9139, the Courts of Kentucky, appear to have treated Kentucky's version of Sec. 105 (Sec. 271A.515) as a statute of limitations. *See Leiserson & Adler Inc.* v. *Kean*, 266 S. W. 2d 352, 356 (Ky. 1954) (treating predecessor of Sec. 271A.515 as a limitation on an entity's ability to enforce a cause of action).

Because we conclude that Sec. 271A.515 does not, by its terms, apply to the cause of action asserted here, we need not decide whether the statute is a true statute of limitations, or whether it

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regardless of the plaintiff's status under Delaware law, this action could not be maintained under Kentucky law. On appeal the defendants vigorously pursue this point; they assert that 271A.515 is a statute of limitations and that the statute bars the commencement of any action more than two years after the corporation was dissolved. Because Hougland Barge Lines was dissolved in March, 1977, the defendants reason that this action, which was commenced in May, 1981, is barred by the two year statute of limitation.

Clearly, the plaintiff can properly proceed in the district court unless KRS Sec. 271A.515 bars this action. The plaintiff's capacity to bring this action is governed by Fed. R. Civ. P. 17(b). Rule 17(b) indicates that the capacity of a party suing as a representative, such as a receiver appointed by a state court, shall be determined by the law of the forum state. *Cohen* v. *LaVin,* 210 F. 2d 550, 552 (2nd Cir. 1954). Kentucky law has long permitted a foreign receiver, who is properly appointed by courts of another state to represent a foreign corporation, to maintain an action in the courts of Kentucky. *Hallan* v. *Ashford,* 70 S. W. 2d 197 (Ky. 1902). Moreover, the question whether an action has abated because of the dissolution of a corporation is controlled by the law of the state of incorporation. *Oklahoma Natural Gas Company* v. *Oklahoma,* 273 U. S. 257, 259 (1926); *United States* v. *Line Material Co.,* 202 F. 2d 929, 931 (6th Cir. 1953). Thus, if Delaware law continues the existence of the corporate entity for purposes of litigation, then the action has not abated, and the plaintiff may pursue the litigation on behalf of the corporation. *Id.* Delaware law generally con-

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merely permits the survival of remedies of dissolved Kentucky corporations. Similarly, we need not consider the full faith and credit arguments advanced by the plaintiff.

tinues the corporate existence for a period of three years after dissolution, Del. Code tit. 8, Sec. 278. After the expiration of the three year period, the corporate entity may be revived by appointing a receiver, and the corporation may, after appointment of a receiver, prosecute and defend lawsuits. Del. Code. tit. 8, Sec. 279; *Johnson* v. *Helicopter & Airplane Services Corp.*, 404 F. Supp. 726, 732 (D. Md. 1975); *Ross* v. *Venezuelan-American Independent Oil Prod. Assn.*, 230 F. Supp. 701, 703 (D. Del. 1964). Because the plaintiff was appointed receiver under Sec. 279 for the purpose of bringing this suit, we believe that the corporate existence continues for the purpose of bringing this suit. Thus, this suit can properly be maintained, unless Ky. Rev. Stat. Sec. 271A.515 in some way limits the plaintiff's ability to prosecute this action.

We believe that Ky. Rev. Stat. Sec. 271A.515 does not affect the plaintiff's ability to bring this action in district court because it applies only to claims which arise *prior* to dissolution. The operative language of Sec. 271A.515 indicates that the dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, *for any right or claim existing, or any liability incurred, prior to such dissolution* if action or other proceedings thereon is commenced within two years after the date of dissolution. . . ." (emphasis added). The italicized language clearly and unambiguously indicates that the limitation period is imposed only with regard to claims existing prior to dissolution.[13] The claim being asserted in this action

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[13]Neither the parties, nor our research, have disclosed the existence of any cases applying Sec. 271A.515 to bar a claim which arose after dissolution and which was not prosecuted until after two years from the date of dissolution. Consequently, we treat this issue as a matter of first impression in the State of Kentucky, and

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did not arise prior to dissolution; in fact, the cause of action asserted here could not have accrued until after dissolution and the winding-up period.[14] We believe that Sec. 271A.515 does not affect the plaintiff's ability to prosecute this action and, consequently, that the district court's decision dismissing this action must be reversed.

Accordingly, the judgment of the district court is reversed, and this matter is remanded for proceedings not inconsistent with this opinion.

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we must apply "the statute in a manner consonant with the literal meaning of its terms. . . ." *Shircliff* v. *Elliott*, 384 F. 2d 947, 950 (6th Cir. 1967).

[14]The corporation was dissolved on March 1, 1977. The IRS assessment was issued on February 23, 1979. The additional taxes and penalties were paid on March 14, 1980. Thus, the cause of action could not have arisen, at the earliest, until February, 1979, nearly two years after dissolution.

If the cause of action is assumed to have accrued in March, 1980, when the question of further tax liability was finally settled, then our interpretation of Sec. 271A.515 avoids the anomaly of a limitation period expiring prior to the accrual of the cause of action. *See Commonwealth Dep't of Transportation* v. *All Points Construction Company*, 566 S. W. 2d 171, 173 (Ky. App. 1978) ("Far from doing violence to legislative design, this approach avoids imputing to the legislative the illogical intent to cut off a right of action before it accrues").

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-5818

KEVIN GROSS, as receiver of Hougland Barge Line, Inc., a dissolved Delaware corporation - - - - - - - - *Plaintiff-Appellant,*

v.

FRANCES M. HOUGLAND, Et Al., - *Defendants-Appellees.*

JUDGMENT—Filed July 11, 1983

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for proceedings not inconsistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

(s) John P. Hehman, Clerk

Issued as Mandate: November 10, 1983

A True Copy

Attest:

(s) Audrey Corbett, Deputy Clerk

Case No. 81-5818

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN GROSS, Et Al. - - - *Plaintiff-Appellant,*

v.

FRANCES M. HOUGLAND, Et Al., - *Defendants-Appellees.*

ORDER—Filed September 12, 1983

BEFORE: KENNEDY and WELLFORD, Circuit Judges; CELEBREZZE, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the Defendant-Appellant and Cross-Appellee, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the petition for rehearing be and it hereby is denied.

ENTRERD BY ORDER OF THE COURT

(s) John P. Hehman